

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 935, 976, 977 -- September Term, 1977
Argued May 3, 1978 Decided November 9, 1978
Docket Nos. 77-6175, 77-6181, 77-6183

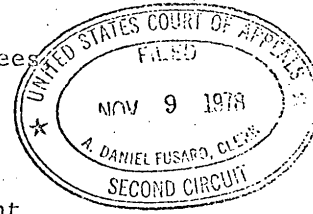
NORMAN BIRNBAUM, B. LEONARD AVERY
and MARY RULE MacMILLEN,

Plaintiffs-Appellees

-against-

UNITED STATES OF AMERICA,

Defendant-Appellant.



Before MOORE, OAKES and GURFEIN, Circuit Judges.

Appeal from a judgment entered in the United States District Court for the Eastern District of New York, Weinstein, J., awarding damages and requiring Government apologies to each of three plaintiffs suing the United States under the Federal Tort Claims Act, for the surreptitious opening of mail by agents of the Central Intelligence Agency ("CIA"). The Court of Appeals held that there was a cause of action for invasion of privacy under state law, and that the action was not barred by any of the exceptions in the Federal Tort Claims Act. The court also held that the awards of damages were proper under the Act, but that the provision for a letter of apology was beyond the jurisdiction of the District Court.

Affirmed as modified.

JOHN M. ROGERS, Attorney, Department of Justice, Washington, D.C.
(Barbara Allen Babcock, Assistant Attorney General, Leonard Schaitman, Attorney, Department of Justice, and David G. Trager, United States Attorney, Eastern District of New York, of counsel), for Defendant-Appellant.

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MICHAEL KRINSKY, New York, N.Y.
(Herbert Jordan, Bill of Rights
Foundation, Rabinowitz, Boudin
& Standard, New York, N.Y. and
K. Randlett Walster, New York, N.Y.,
on the brief), for Plaintiff-Appellee
Birnbaum.

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7

MELVIN L. WULF, New York, N.Y.
(Clark, Wulf & Levine, New York, N.Y.,
Burt Neuborne, NYU School of Law,
New York, N.Y., Richard W. Zacks,
Providence, R.I., and Joel M. Gora,
American Civil Liberties Union
Foundation, New York, N.Y., of
counsel), for Plaintiffs-Appellees
Avery and MacMillen.

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1 GURFEIN, Circuit Judge:

2 For twenty years (from approximately 1953 to 1973),
3 the Central Intelligence Agency ("CIA") covertly opened
4 first class mail which American citizens sent to, or received
5 from, the Soviet Union. Letters destined for the U.S.S.R.,
6 or originating there, were selected by agents in New York,
7 photocopied, and then returned to postal authorities for
8 ultimate delivery. Selection criteria were employed, but
9 some letters were chosen at random. During the existence
10 of the project over 215,000 pieces of mail were inspected
11 and copied in this fashion.
12

13 In 1958, the Federal Bureau of Investigation
14 ("FBI") was informed of the existence of the CIA's East
15 Coast mail project, known by the cryptonyms HTLINGUAL and
16 SRPOINTER, and the CIA offered to share the project's
17 "take" with the FBI. FBI Director Hoover gave his approval,
18 and the FBI provided the CIA with the names and categories
19 of persons or organizations in which it had an "internal
20 security" interest. Such lists were used as additional
21 guides by the CIA in making selections from the United
22 States-Soviet mail that passed through the CIA check point.
23 D.J. Report at 13. The CIA released photocopies of some
24 letters to the FBI in aid of that agency's mission with
25 respect to suspected domestic subversion.

26 Norman Birnbaum, Mary Rule MacMillen and
27 B. Leonard Avery, whose mail was opened and copied,
28 separately sued the United States for compensatory damages,
29 invoking the exclusive jurisdiction conferred on the
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1 district courts (28 U.S.C. § 1346(b)) under the Federal Tort
2 Claims Act, 28 U.S.C. §§ 2671-2680 ("the Act").² In the
3 cases of Birnbaum and MacMillen, the opened letters had
4 been intercepted en route to the U.S.S.R., in 1970 and 1973,
5 respectively. Avery's letter had been opened in 1968, while
6 arriving in the United States from the Soviet Union.³

7 The three cases were consolidated in the District
8 Court for the Eastern District of New York (Hon. Jack B.
9 Weinstein, Judge). Although an advisory jury was empanelled,
10 the District Judge, as required, tried the case himself,
11 28 U.S.C. § 2402, and found that the United States was
12 liable to each plaintiff individually for damages in the
13 amount of \$1,000. The United States was also required to
14 send a letter of apology to each plaintiff.⁴ 436 F. Supp.
15 967, 989-90 (1977). From this judgment the United States
16 appeals.
17

18 I

19 Before the Act was passed in 1946, the United
20 States, as sovereign, possessed complete immunity against
21 suit for torts committed by its agents and employees.
22 Feres v. United States, 340 U.S. 135, 139-40 (1950);
23 see Tempel v. United States, 248 U.S. 121, 131 (1918);
24 Hill v. United States, 149 U.S. 593, 598 (1893). The only
25 redress was by private bill in the Congress. The purpose
26 of the Act was generally to waive the sovereign immunity
27 of the United States for torts of its employees committed
28 within the scope of their employment, if such torts committed
29 in the employ of a private person would have given rise to
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1 liability under state law, 28 U.S.C. § 1346(b). Thus,
 2 recovery under the Act could only be predicated upon such
 3 a state tort cause of action.⁵ Moreover, in groping for a
 4 formula that would eliminate the nuisance of private bills
 5 and yet interfere only minimally with government functions,
 6 Congress created statutory exceptions to the general
 7 waiver of immunity in the Act. Three of these are arguably
 8 applicable here: (1) 28 U.S.C. § 2680(h), excluding certain
 9 specified torts from the ambit of the Act; (2) § 2680(b),
 10 exempting from the Act any liability for loss or miscarriage
 11 of mail; (3) § 2680(a), creating an exemption from liability
 12 for acts done pursuant to a discretionary function. If the
 13 claim in suit falls within one of the statutory exceptions,
 14 the district court lacks subject matter jurisdiction. See
 15 Myers & Myers, Inc. v. U.S. Postal Service, 527 F.2d 1252,
 16 1255 (2d Cir. 1975); Gibson v. United States, 457 F.2d 1391,
 17 1392 & n.1 (3d Cir. 1972); Morris v. United States, 521 F.2d
 18 872, 874 (9th Cir. 1975).

20 II

21 The jurisdictional grant of the Act, 28 U.S.C.
 22 § 1346(b), gives the District Court

23
 24 exclusive jurisdiction of civil actions
 25 on claims against the United States,
 26 for money damages ... for injury or
 27 loss of property, or personal injury
 28 or death caused by the negligent or
 29 wrongful act or omission of any employee
 30 of the Government while acting within the
 31 scope of his office or employment, under
 32 circumstances where the United States,
 if a private person, would be liable to
 the claimant in accordance with the law
 of the place where the act or omission
 occurred. (Emphasis added).

1 The District Court, therefore, had jurisdiction of the
 2 subject matter only (1) if there was a "personal injury"
 3 as defined by state law, and (2) if the acts causing the
 4 "personal injury" would give rise to liability under state
 5 law if executed by an employee of a private person.

6 A.

7 Personal Injury

8 Although upon the consolidated trial it appeared
 9 that no plaintiff was touched physically or harmed finan-
 10 cially, and that the sole damage claim was mental suffering,
 11 New York recognizes as "personal injury" mental suffering
 12 that results from a known category of tort. Battalla v.
 13 New York, 10 N.Y. 2d 237, 176 N.E. 2d 729, 219 N.Y.S. 2d 34
 14 (1961); Ferrara v. Galluchio, 5 N.Y. 2d 16, 152 N.E. 2d 249,
 15 176 N.Y.S. 2d 996 (1958); Halio v. Lurie, 15 A.D. 2d 62,
 16 222 N.Y.S. 2d 759 (2d Dept. 1961); see also N.Y. Gen. Con.
 17 Law § 37-a (McKinney).
 18

19 B.

20 Basis for Liability Under State Tort Law

21 The District Court held in a scholarly opinion
 22 that an action in tort would lie in New York alternatively for the
 23 following: (1) invasion of the common law right to privacy;
 24 (2) injury to common law copyright and property interest
 25 in private papers; and (3) direct violation of constitutional
 26 right. We review these causes of action under the law of
 27 New York seriatim.

28 Common law right to privacy

29 The manifold nature of what is loosely termed "the
 30 right to privacy" is well established. Both Dean W. Prosser,
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1 The Law of Torts § 117 (4th ed. 1971), and the advisers of
 2 3 Restatement (Second) of Torts § 652A (1977), agree
 3 that the right to privacy comprehends four distinct rights,
 4 "which are tied together by the common name, but otherwise
 5 have almost nothing in common except that each represents
 6 an interference with the right of the plaintiff 'to be let
 7 alone.'" Prosser at 804.

8 The four privacy rights listed in the Restatement
 9 are:

- 11 a) unreasonable intrusion upon the seclusion
 12 of another.... or
- 13 b) appropriation of the other's name or
 14 likeness or
- 15 c) unreasonable publicity given to the other's
 16 private life ... or
- 17 d) publicity that unreasonably places the
 18 other in a false light before the public....

19 § 652A (1977).

20 These cases all concern infringements of a
 21 single right -- the right to seclusion free from unreasonable intrusion
 22 by another. The activities of the Government in opening
 23 and reproducing plaintiffs' mail constituted such an intru-
 24 sion. As described by the Restatement, violation of the
 25 right against intrusion may occur through "opening
 26 [one's] private and personal mail" 3 Restatement,
 27 supra, § 652B, comment b, at 378-79; cf. LaCrone v. Ohio
 28 Bell Tel. Co., 114 Ohio App. 299, 182 N.E. 2d 15 (1961)
 29 (intrusion by eavesdropping).

30 Appellant United States contends, however, that
 31 New York does not recognize a common law right to privacy.
 32

1 Appellant places its reliance principally on the famous
2 1902 case of Roberson v. Rochester Folding Box Company,
3 171 N.Y. 538, 64 N.E. 442. There, in commenting upon the
4 seminal article by Warren and Brandeis, The Right to Privacy,
5 4 Harv. L. Rev. 193 (1890), a 4 to 3 majority of the New
6 York Court of Appeals observed that "the so-called 'right
7 of privacy' has not as yet found an abiding place in our
8 jurisprudence," 171 N.Y. at 556, 64 N.E. at 447, and
9 denied a remedy for the appropriation and commercial
10 exploitation of the plaintiff's likeness.

11 Whatever the sweep of some of the language in the
12 case, Roberson does not bar a cause of action for intrusion.
13 As indicated, the "right to privacy" includes several
14 discrete torts within its ambit, of which appropriation is
15 only one. As Holmes observed, "[w]e do not get a new and
16 single principle by simply giving a single name to all the
17 cases to be accounted for," The Common Law at 204 (1945 ed.).
18 That the Roberson court rejected a privacy right in the
19 context of an appropriation does not imply a rejection of
20 a remedy for intrusion.

21 Moreover, the court in Roberson rested its decision
22 on the lack of precedent in English law for enjoining the
23 appropriation and publication of a photograph which did not
24 actually defame the plaintiff or injure her reputation.
25 The court was not asked to consider the right to be secure
26 in one's papers as the foundation for an actionable wrong.
27 Had there been occasion to address the intrusion question,
28 the court might well have upheld a cause of action because,
29 unlike appropriation, intrusion had been previously acknowl-
30 edged as a species of tort.

1 Such a right had been recognized before the
 2 American Revolution. In Entick v. Carrington, 95 Eng. Rep. 807,
 3 19 How. St. Tr. 1029 (C.P. 1765), the British Secretary of
 4 State issued a non-judicial search warrant to procure
 5 evidence of seditious libel. His messengers entered the
 6 plaintiff's house under the authority of the purported
 7 warrant and seized and perused private papers. Though the
 8 action was technically a trespass to the home, Lord Camden
 9 read the protections of privacy more broadly. The court
 10 commented:

11
 12 [W]e can safely say there is no law in this
 13 country to justify the defendants in what
 14 they have done; if there was, it would
 15 destroy all the comforts of society; for
 16 papers are often the dearest property a
 17 man can have.

18 95 Eng. Rep. at 817-18.

19 By 1902 there were actual cases in New York in
 20 which damages had been awarded for intrusions upon privacy
 21 that were the consequence of other torts. In Moore v.
 22 New York Elev. R. Co., 130 N.Y. 523, 29 N.E. 997 (1892),
 23 the Court of Appeals reviewed an action brought for impair-
 24 ment of certain easements of a homeowner by the construction
 25 of an elevated railway. The court allowed an award of
 26 damages for the reduction in the value of the property
 27 due to the fact that the public travelling on the elevated
 28 trains could view the interiors of certain rooms. And an
 29 earlier New York Common Pleas case had granted damages for
 30 invasion of privacy by intrusion suffered in the course of
 31 an unlawful repossession of chattels from a home. Ives v.
 32 Humphreys, 1 E.D. Smith 196 (1851).⁸

1 When Roberson was decided, then, authority was not
 2 lacking that freedom from intrusion was at least derivatively
 3 protected. More recently, the broad right to privacy has
 4 secured the general recognition which the Roberson court
 5 thought was lacking with respect to the limited tort of
 6 appropriation. In the nineteen-thirties "the tide set in
 7 strongly in favor of recognition" of the tort of invasion
 8 of privacy and it was accepted in most jurisdictions.
 9 Prosser, at 804; see Note, The Right to Privacy Today,
 10 43 Harv. L. Rev. 297 (1929) (by the writer); Feinberg, Recent Developments
 11 in the Law of Privacy, 48 Col. L. Rev. 713 (1948) (the
 12 author now sits on this court); 1 F. Harper & F. James,
 13 Law of Torts, § 9.6 at 682-83 (1956).⁹

14 Intrusion upon the person has, in more recent
 15 times, been held to be a violation of the Federal Bill of
 16 Rights, extending the early recognition that opening mail
 17 without warrant is a violation of the Fourth Amendment.
 18 Ex parte Jackson, 96 U.S. 727 (1878). Nothing could be
 19 more revealing of the spirit of the times, for the Constitu-
 20 tion does not, of course, say a single word about privacy.
 21 Compare Katz v. United States, 389 U.S. 347 (1967) (conceptual-
 22 izing Fourth Amendment in terms of privacy) and Justice
 23 Brandeis dissenting in Olmstead v. United States, 277 U.S.
 24 438, 478-79 (1928). Justice Frankfurter in Wolf v. Colorado,
 25 338 U.S. 25 (1949), while refusing to apply the exclusionary
 26 rule of Weeks v. United States, 232 U.S. 383 (1914), to
 27 the states, announced that "[t]he security of one's privacy
 28 against arbitrary intrusion by the police -- which is at the
 29 core of the Fourth Amendment -- is basic to a free society."

1 Id. at 27. The proscription against such intrusions has
 2 been applied in numerous constitutional contexts. See,
 3 e.g., Rochin v. California, 342 U.S. 165, 172 (1952) (use
 4 of stomach pump to extract evidence violates Fourteenth
 5 Amendment); NAACP v. Alabama, 357 U.S. 449, 466 (1958)
 6 (right to pursue "lawful private interests privately");
 7 Griswold v. Connecticut, 381 U.S. 479 (1965) (marital
 8 privacy); Katz v. United States, supra (privacy in
 9 conversation).

10 In the light of the current jurisprudence, it
 11 is hard to believe that the New York Court of Appeals today
 12 would apply the rationale of the 1902 Roberson decision to
 13 bar an action based on intrusion upon privacy.¹⁰ In sharp
 14 contrast to the reluctance of the 1902 court to advance
 15 the common law, a more contemporary New York Court of
 16 Appeals has said, in another context:

17
 18 The sum of the argument against plaintiff
 19 here is that there is no New York decision in
 20 which such a claim has been enforced.... [but]
 21 "if that were a valid objection, the common
 22 law would now be what it was in the Plantagenet
 23 period." [citation omitted] ... We act in the
 24 finest common-law tradition when we adapt
 25 and alter decisional law to produce common-
 26 sense justice.

23 ... Legislative action there could, of
 24 course, be, but we abdicate our own function,
 25 in a field peculiarly nonstatutory, when
 26 we refuse to reconsider an old and unsatis-
 27 factory court-made rule.

28 Woods v. Lancet, 303 N.Y. 349, 355, 102 N.E. 2d 691, 694 (1951).¹¹

29 A recognition of a right to privacy against
 30 intrusion is supported in New York, moreover, by current
 31 legislative policy, couched though it is in terms of the
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1 criminal sanction. New York Penal Law Article 250 (Right
2 to Privacy) § 250.25(1) provides that a person is guilty of
3 tampering with private communications when "[k]nowing that
4 he does not have the consent of the sender or receiver,
5 he opens or reads a sealed letter" We do not force
6 the implication of a remedy in money damages from the
7 criminal sanction, for that would go beyond our function
8 in finding New York law. Cf. Cort v. Ash, 422 U.S. 66,
9 78-80 (1975). We think, however, that in gathering the
10 strands of policy which affect our prophecy, intrusion
11 into private papers is now beyond the limit of civil as well
12 as penal indulgence.¹²

13 Mindful that our role under the Federal Tort Claims
14 Act is to ascertain state law, rather than to depart from it,
15 we are also aware that "[l]aw does change with times and
16 circumstances, and not merely through legislative reforms."
17 Bernhardt v. Polygraphic Co., 350 U.S. 198, 209 (1956)
18 (Frankfurter, J., concurring); see Battalla v. State, *supra*.
19 A refusal to accept a perceptible trend may be as much a
20 failure to follow state law as a refusal to apply existing
21 precedent because it is somewhat ambiguous. Our reading
22 of past cases and our assessment of current legal thinking
23 lead us to the judgment that the New York Court of Appeals
24 would recognize an action for violation of the right to be
25 free from unreasonable intrusion.¹³ We agree with the
26 District Court that there is a claim for relief in New
27 York against a private person for intrusion upon the privacy
28 of another, and that such a claim includes the opening and
29 reading of sealed mail.¹⁴
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1 Common Law Copyright and Property Interest
 2 in Private Papers

3 The District Court has written a scholarly thesis
 4 supporting the view that the reading of private mail was a
 5 violation of a common law copyright of the correspondents
 6 under New York law. 436 F. Supp. at 978-83. Judge
 7 Weinstein concedes that the New York courts have not had
 8 a case directly in point. We do not doubt that the New
 9 York courts accept the English doctrine of Gee v. Pritchard,
 10 36 Eng. Rep. 670 (Ch. 1818) that private letters, even if of no
 11 literary value, are protected by common law copyright.
 12 Woolsey v. Judd, 11 Super. Ct. (4 Duer) 379 (N.Y. 1855);
 13 see Folsom v. Marsh, 9 Fed. Cas. 342 (C.C.D. Mass. 1841)
 14 (per Story, J.). But the common law copyright is, in
 15 essence, a right of first publication, 1 Nimmer on Copyright
 16 §§ 4.02, 4.03 & 4.07 (1978); Estate of Hemingway v. Random House,
 17 53 Misc. 2d 462, 464, 279 N.Y.S. 2d 51, 54-55 (Sup. Ct.),
 18 aff'd by order, 29 A.D. 2d 633, 285 N.Y. 2d 568 (1st Dept.
 19 1967), aff'd on other grounds, 23 N.Y. 2d 341, 244 N.E. 2d
 20 250, 296 N.Y.S. 2d 771 (1968), which of necessity includes¹⁵
 21 the right to suppress any publication by injunction.
 22 Hence, although one may enjoin the publication of letters
 23 to effectuate their suppression, the damage remedy
 24 (defamation aside) would lie only if there were a
 25 spoliation of the right to a first publication which actu-
 26 ally destroyed the value of the owner's right to seek
 27 a statutory copyright. See Szekely v. Eagle Lion Films,
 28 140 F. Supp. 843, 849 (S.D.N.Y. 1956), aff'd, 242 F.2d 266
 29 (2d Cir.), cert. denied, 354 U.S. 922 (1957).
 30 Since the owner of the letter did not consent to
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1 its publication, he did not lose his right to first
 2 publication. See Nimmer, § 4.03. And the mere copying
 3 and limited distribution of the letter did not constitute
 4 a distribution to the public that could cause damage to
 5 the value of the owner's continuing right to secure a
 6 statutory copyright. See Estate of Hemingway, supra,
 7 53 Misc. 2d at 464-65. We would find it strained, in any
 8 event, to say that the reading of the plaintiffs' letters
 9 by several persons, none of whom circulated them to the
 10 world, is a "publication" that destroys the value of the
 11 work in question. See 2 Nimmer § 8.23; cf. Universal
 12 Copyright Convention, art. VI (Paris 1971) (publication
 13 defined as "general distribution"); Berne Convention
 14 (Brussels 1948), art. 4(4) (publication involves making
 15 works available in "sufficient quantities"); see also
 16 Berne Convention (Paris 1971), art. 3(3).¹⁶ Hence, we
 17 do not find the tort of infringement of common law copyright
 18 applicable in the instant case.

19
 20 Violation of Constitutional Rights
 21 as Tortious Conduct

22 The District Court also held that the violation
 23 of plaintiffs' federal constitutional rights is a separate
 24 ground for liability under state law.¹⁷ We do not believe
 25 that the Federal Tort Claims Act comprehends federal consti-
 26 tutional torts in its reference to the "law of the place"
 27 under § 1346(b). As described in the House Judiciary
 28 Committee Report dealing with the Act's direct predecessor
 29 bill, see Dalehite v. United States, 346 U.S. 15, 26 (1953),
 30 the
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1 applicable rules of substantive decision, except where other-
 2 wise specified, were to be drawn from "local law." H. Rep.
 3 2245, 77th Cong., 2d Sess., at 9 (1942). Attention was
 4 focused on everyday torts, particularly the sort of negligence
 5 of which automobile drivers are guilty. Even though federal
 6 law is supreme in the state courts, U.S. Const., art. VI;
 7 Testa v. Katt, 330 U.S. 386, 391 (1947); General Oil Co. v.
 8 Crain, 209 U.S. 211, 226-28 (1908), one does not think of
 9 the specific terminology of "local law" except to
 10 describe a system different from federal law. In the absence
 11 of any indication that Congress conceived of "local law"
 12 under the Act as comprehending federal constitutional torts --
 13 only a glimmer until Bell v. Hood, 327 U.S. 678 (1946) --
 14 we are not prepared to adopt so unusually broad a reading of
 15 the "law of the place" requirement. Moreover, by adopting
 16 the "law of the place" as the source for rules of decision
 17 under the Federal Tort Claims Act, Congress expressly
 18 negated any possible inference that federal courts were to
 19 exercise any "common law-making" power to fashion torts
 20 under the Act in the interest of national uniformity.¹⁸
 21 Compare Textile Workers Union v. Lincoln Mills, 353 U.S. 448
 22 (1957).

23 Since Congress restricted the basis for liability
 24 under the Act to the "law of the place," we think that
 25 it would be a tour de force to consider direct violations
 26 of the federal constitution as "local law" torts. Such a
 27 rule might be tantamount to a bypass of the sovereign
 28 immunity of the United States without the consent of Congress.
 29 We hold, accordingly, that the claim for relief may not be
 30 sustained on that basis.
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III

Having found that each of the plaintiffs suffered a personal injury as a result of an intrusion upon privacy by the Government that would give rise to a private law tort under the law of New York, we determine that the initial jurisdictional requirement of 28 U.S.C. § 1346(b) has been met.

We must now consider whether the Government may claim an exception from liability under the provisions of 28 U.S.C. § 2680. We will focus upon three exceptions: (1) § 2680(h), for certain specified torts; (2) § 2680(b) for miscarriage of mail; and (3) § 2680(a), for discretionary functions.

A. § 2680(h)

Under this subsection of the Federal Tort Claims Act, there is an exception for:

Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights....

Although this exception might be construed as excepting all intentional torts, the Government does not urge that reading upon us. In any event, the jurisdictional statute, 28 U.S.C. § 1346(b), covers "wrongful" as well as negligent acts. See Hathaley v. United States, 351 U.S. 173 (1956); Dalehite v. United States, *supra*, at 45 (dictum). Thus, it has been held that the torts of trespass and invasion of privacy do not fall within the exception of § 2680(h). See Hatahley, *supra* (trespass); Black v. Sheraton Corp. of America, 564 F.2d 531, 539-41 (D.C. Cir. 1977) (invasion of privacy).¹⁹

1 B. § 2680(b): The Postal Exception

2 We turn next to the postal exception, which also
3 requires little discussion. The exception relates to
4 "[a]ny claim arising out of the loss, miscarriage, or
5 negligent transmission of letters or postal matter."

6 The language of the exception itself indicates
7 that it was not aimed to encompass intentional acts. Had
8 Congress intended to bring intentional disturbance of the
9 integrity of a letter within the postal exception, it
10 would not have used the term "negligent transmission."
11 Nor were the letters lost or miscarried. "Miscarriage"
12 in the context of mail means misdelivery.

13 We hold, therefore, that the postal exception
14 does not apply to save the United States from liability
15 in these cases. 20

16 C. § 2680(a): "Discretionary Function" Exception

17 Finally, we turn to consider whether the Government's
18 mail opening project is removed from the scope of the Federal
19 Tort Claims Act by § 2680(a), which provides that:

20 Any claim based upon an act or omission
21 of an employee of the Government, exercising
22 due care, in the execution of a statute or
23 regulation, whether or not such statute or
24 regulation be valid, or based upon the exer-
25 cise or performance or the failure to exer-
26 cise or perform a discretionary function or
27 duty on the part of a federal agency or an
28 employee of the Government, whether or not
29 the discretion be abused.

30 This is not a case where Congress has passed a
31 mail-opening statute that is being challenged as unconsti-
32 tutional. It is common ground that there is no statute or
regulation which sanctions the mail opening procedure
engaged in by the CIA.

1 Our inquiry relates therefore only to whether
2 the CIA personnel were engaging in a "discretionary
3 function," rather than executing a policy required by "statute
4 or regulation." The "discretionary function" exception is
5 distinct from the exception based upon a statute or regula-
6 tion. See Dalehite v. United States, supra, at 32-34.

7 We state our conclusions in summary form.
8 We hold: (1) that a discretionary function can only be
9 one within the scope of authority of an agency or an
10 official, as delegated by statute, regulation, or juris-
11 dictional grant; (2) that the CIA's legislative charter
12 gave the Agency no authority to gather intelligence on
13 domestic matters; (3) that the Agency's partnership with
14 the FBI in the mail opening project led it to transgress
15 the limitations of its charter; and (4) that there was no
16 "discretion" to engage in these mail opening activities,
17 so that the discretionary function exception does not apply.
18 Hence, we do not reach the question whether a properly
19 delegated but unconstitutional activity would come within
20 the "discretionary function" exception. Nor do we reach
21 the question posed by the Government: whether Congress
22 intended to allow actions to be brought under the Act
23 which challenge discretionary acts as unconstitutional.
24 We note that, of course, such acts or omissions alleged
25 to be unconstitutional -- for example, violations of
26 procedural due process -- would support liability under
27 the Act only if they constituted independent torts under
28 state law. It would be an unusual situation when such a
29 concatenation of wrongs would occur. But cf. Myers & Myers,
30 Inc. v. U.S. Postal Service, supra, at 1260 & n.8.
31
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1.

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2 A discretionary function can derive only from
3 properly delegated authority. Authority generally stems
4 from a statute or regulation, or at least, from a juris-
5 dictional grant that brings the discretionary function
6 within the competence of the agency. Discretion may be as
7 elastic as a rubber-band, but it, too, has a breaking point.
8 An act that is clearly outside the authority delegated
9 cannot be considered as an "abuse of discretion." See
10 Hatahley v. United States, supra; Myers & Myers, Inc. v.
11 U.S. Postal Service, supra, at 1261 (no discretion to violate
12 regulations); Griffin v. United States, 500 F.2d 1059,
13 1068 (3d Cir. 1974) (same); United Air Lines v. Wiener,
14 335 F.2d 379, 393-94 (9th Cir.) (same), cert. dismissed,
15 379 U.S. 951 (1964).²¹

16 In Hatahley v. United States, horses belonging to
17 Indians were rounded upon on the public range and sent to
18 slaughter by federal agents on the ground that they were
19 "abandoned" horses under a Utah statute which permitted
20 such horses to be eliminated. Under the Utah statute,
21 no notice was required. The Federal Range Code, however,
22 required that written notice, together with an order to
23 remove livestock from the public range, be served on the
24 alleged violator as a precondition to impounding the animals.
25 The federal range manager made a policy decision to prosecute
26 a vigorous campaign to destroy the Indians' horses. This
27 campaign went on for several years. 351 U.S. at 176. The
28 range manager apparently determined that under the Utah
29 statute he was not required to give the notice mandated by
30 the Federal Range Code.
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1 The Supreme Court held that "both the written
2 notice and failure to comply [therewith] are express
3 conditions precedent to the employment of local procedures"
4 under the Range Code, and that federal agents "are required
5 to follow the procedures there established." Id. at 178.
6 The United States was held liable for "the willful torts"
7 of its employees, since 28 U.S.C. § 1346(b) provides for
8 liability for "wrongful" acts such as trespass. Id. at 180-81.

9 The Court then considered the exception in
10 28 U.S.C. § 2680(a). It held that the agents had not
11 exercised the "due care" required by the exception, noting
12 that "'[d]ue care' implies at least some minimal concern
13 for the rights of others." The Court disposed of the con-
14 tention that the "discretionary function" exception applied
15 to these acts beyond the scope of regulations by declaring
16 that "[t]hese acts / ^{were} wrongful trespasses not involving
17 discretion on the part of the agents" Id. at 181.

18 Hatahley is significant authority in several respects.
19 First, it had never been decided before Hatahley that
20 notice was required under the Federal Code when the agents
21 were engaged in enforcing the Utah statute. In fact, even
22 the Court of Appeals had held below that no such notice
23 was required. 220 F.2d 666 (10th Cir. 1955). Second, the
24 agents were engaged in a policy promulgated by the range
25 manager and in force for several years. Yet the Court held
26 that because the notice required by the regulation was not
27 given, the policy judgment in question was without authority
28 and therefore did not concern "any problem of a 'discretionary
29 function' under the Act [citation omitted]." 351 U.S. at 181.
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2.

After some debate within the Executive Branch, President Truman issued a directive creating the Central Intelligence Group, early in 1946. The Presidential Directive was explicit in limiting the Group's rôle to foreign intelligence gathering. It declared that "[n]o police, law enforcement or internal security functions shall be exercised" and that

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1 of the United States and its possessions,
2 except as provided by law and Presidential
directives.

3 Presidential Directive, Coordination of Federal Foreign
4 Intelligence Activities, F.R. Doc. 46-1951 (Feb. 1, 1946);
5 see Rockefeller Report at 51.

6 The Central Intelligence Agency was chartered by
7 legislative enactment in 1947. The scope of its authority
8 and the limitations thereon were patterned upon General
9 Donovan's recommendations and the experience of the Central
10 Intelligence Group. Critical provisions of this legislative
11 charter, contained in the National Security Act of 1947,
12 Pub. L. No. 253 § 102(d) & (e), 61 Stat. 497, codified
13 at 50 U.S.C. § 403(d) & (e), placed the Agency under the
14 supervision of the National Security Council and directed
15 the Agency to

16
17 correlate and evaluate intelligence
18 relating to the national security,
19 and [to] provide for the appropriate
dissemination of such intelligence
within the Government

20 § 102(d)(3).
21 /It also provided specifically "[t]hat the Agency shall have
22 no police, subpoena, law-enforcement powers, or internal
23 security functions."

24 The meaning of these provisions is clarified by
25 reference to their legislative history. Members of Congress
26 were concerned that failure precisely to spell out the new
27 Agency's limitations in the National Security Act might
28 permit the Agency to expand its activities into internal
29 security matters. See Hearings on H.R. 2319 Before the
30 House Comm. on Expenditures in the Executive Dept.,
31 80th Cong., 1st Sess., at 126-28, 170-75, 437-39, 479-81.
32

1 22
 2 (1947). Congress responded to this issue by amending
 3 the proposed Act to define the duties of the Agency and,
 4 specifically, to restrain any entry by the CIA into
 5 "internal security" matters. H. Rep. No. 961, 80th Cong.,
 6 1st Sess. 3-4 (1947); National Security Act, supra, § 102(d).

7 Furthermore, National Security Council Intelligence
 8 Directives, designed to guide the CIA, permitted so-called
 9 "overt" collection of foreign intelligence within the
 10 United States (i.e., collection with the knowing and
 11 voluntary cooperation of sources) but not "clandestine"
 12 collection in the United States (i.e., collection without
 13 the source's awareness). Rockefeller Report at 55.

14 Thus, all parties involved in drafting and passing
 15 the legislation stated expressly at times, and indicated
 16 implicitly throughout, that the CIA was not to become
 17 concerned with developing intelligence as to domestic or
 18 internal security matters, except "for protecting intelli-
 19 gence sources and methods from unauthorized disclosure."
 20 § 102(d)(3), 50 U.S.C. § 403(d)(3). The subject matter of the Agency's
 21 interest was to be foreign activity, not activity at home,²³
 22 and the Agency was not to have any "internal security
 23 functions." § 102(d)(3), 50 U.S.C. § 403(d)(3).

24 As noted, from 1958 on, the CIA began to examine
 25 intercepted mail not only to satisfy its own need for
 26 intelligence about the U.S.S.R., but to satisfy as well
 27 the FBI's requirements for counterespionage information
 28 and data on "peace organizations, antiwar leaders, black
 29 activists, and women's groups." Senate Report at 624.²⁴

1 By the mid-sixties, then, the CIA had undertaken an operation
2 that involved broad and indiscriminate inspection of private
3 mail with a view to obtaining information on matters of
4 domestic, as well as foreign, concern.

5 There was no room in the charter for a "policy
6 judgment" that the CIA should involve itself in gathering secret
7 data on domestic problems. Indeed the CIA knew this as well
8 as anyone. An Agency internal memorandum admitted that
9 "there is no legal basis for monitoring postal communications
10 in the United States except during time of war or national
11 emergency" ²⁵

12 We find, therefore, that the CIA was acting so
13 far beyond its authority that it could not have been exer-
14 cising a function which could in any proper sense be called
15 "discretionary." ²⁶ See Hatahley, supra.

16 - 3.

17 Though we hold that these activities of the CIA
18 were beyond the realm of discretion, we cannot share
19 entirely the moral concern of the District Court over
20 these activities, for the security of the nation was
21 said to be involved. We assume that the CIA officials
22 meant well by their country. Even testimony before the
23 Senate Committee by a principal CIA official, stating that
24 he knew that the mail opening was illegal but thought it
25 in the national interest, Senate Report at 605, gives us
26 no cause for a homily. As the Attorney General reported:

27
28 The issue involved in these past
29 programs, in the Department's view,
30 relates less to personal guilt than to
31 official government practices that
32

1 extended over two decades. In a very
 2 real sense, this case [mail opening]
 3 involves a general failure of the government,
 4 including the Department of Justice itself,
 5 over the period of the mail opening programs,
 6 ever clearly to address and to resolve for
 7 its own internal regulation the constitutional
 8 and legal restrictions....

9 D.J. Report at 5. It appears to us that it would be hypo-
 10 critial for judges now to assess the activity in terms of
 11 moral censure.

12 4.

13 Nevertheless, while, as federal agents, the CIA
 14 personnel may still have an absolute immunity from state
 15 suits, Butz v. Economou, 98 S. Ct. 2894, 2905 & n. 22 (1978);
 16 Granger v. Marek, 47 U.S.L.W. 2152 (6th Cir., Aug. 30, 1978);
 17 see Howard v. Lyons, 360 U.S. 593 (1959), the CIA agents'
 18 qualified immunity in federal constitutional suits arising
 19 out of this set of circumstances, see Bivens v. Six Unknown
 20 Named Agents, 403 U.S. 388 (1971); may well not protect them
 21 if it be found that their mail openings were "unconstitutional
 22 action on a massive scale." Economou at 2910.

23 Since a judgment in an action against the United
 24 States under the FTCA will constitute a judgment in bar
 25 in favor of the employee whose act gave rise to the
 26 claim, 28 U.S.C. § 2676, it is likely, however, that
 27 claims for torts would be made against the
 28 United States rather than, as Bivens suits, against the employee.

29 That is as it should be. The CIA agent who,
 30 in other days, might have been a candidate for a
 31 citation of merit, should not now be made to suffer alone
 32 an ignominious financial ruin. The term "discretionary
 function", left obscure by Congress, permits a judicial
 interpretation which achieves substantial justice without

1 chilling governmental action any more than an erosion of
 2 the absolute immunity of Government officials has been
 3 thought to chill such action. Compare Economou, supra,
 4 with Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir.),
 5 cert. denied, 339 U.S. 940 (1949).

6
 7 The responsibility is lodged, under the FTCA,
 8 where the careful report of the Attorney General says it
 9 belongs -- on a diverse and complacent officialdom.
 10 Compensation for incidental harm resulting from the Govern-
 11 ment's pursuit of its security interests is more justly
 12 borne by the entire body politic than by agents of the
 13 Government, who, out of patriotic zeal, exceeded the outer
 14 limits of their delegated authority. So long enduring
 15 and pervasive a breach of privacy, in the face of an
 16 utter lack of authority, is fittingly a responsibility
 17 the United States should assume to compensate the
 18 plaintiffs.

19 This approach to the discretionary function
 20 provision, moreover, is congruent with developments in
 21 the interpretation of constitutional and statutory law
 22 that have increasingly extended state and municipal
 23 liability for civil rights violations that are analogous
 24 to the privacy tort involved in the instant case.
 25 Compare Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), and
 26 Monell v. Department of Social Serv., 98 S. Ct. 2018 (1978).

27 We hold that the exception in § 2680(a) is no
 28 bar to recovery against the United States.

30 IV

31 Having determined that the United States is liable
 32 to these plaintiffs for harm caused by mail openings, we

1 must review the District Court's award of \$1000 in compensa-
2 tory damages and of an apology to each plaintiff.

3 Although damages under the Act are governed by
4 state law, Ratahley, supra, at 182, the Act limits recovery
5 to compensatory damages and provides that the United States
6 shall not be liable for punitive damages, 28 U.S.C. § 2674.
7 In New York, as we have seen, freedom from mental disturbance
8 is a protected interest, but there must be a "'guarantee
9 of genuineness in the circumstances of the case.'" Ferrara
10 v. Galluchio, supra, at 21, 152 N.E.2d at 252, . . .
11 176 N.Y.S. 2d at 999-1000 (quoting Prosser).²⁷

12 The question is whether the testimony of the plaintiffs
13 sustains a finding of mental anguish under New York law,
14 in which event the judgment for \$1,000 each would not be
15 excessive, or whether there was no actual damage, in which
16 case only nominal damages of one dollar would have been
17 proper. Cf. Carey v. Piphus, 435 U.S. 247 (1978)
18 (construing § 1983).²⁸

19 The answer is not easy. There was no finding of
20 physical injury and no loss of employment. There also
21 was no mental injury in the sense of "permanent symptoms
22 of anxiety." Ferrara, supra.

23 The question whether a finding of mental anguish
24 is sustainable is further complicated by two unusual
25 features of these cases. First, the plaintiffs deliberately
26 sought to find out under the Freedom of Information Act
27 whether their mail had been tampered with. In direct
28 response to their curiosity, they received the information
29 which resulted in the purported injury. Thus, in a strict
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1 sense, "but for" the plaintiffs' acts in uncovering the
 2 openings, they might never have been made to suffer anguish
 3 over the Government's wrongs. Second, the letters inter-
 4 fered with were being transported to or from the Soviet
 5 Union, a closed society in which, as most people are aware,
 6 mail may be opened by secret police without "constitutional"
 7 restraint. Only the naive would be emotionally unprepared
 8 for the possibility that a letter might be opened in the
 9 Soviet Union. Under those circumstances, it is somewhat
 10 difficult to credit the proposition that a reasonable
 11 person would be shocked by the mere fact that a letter
 12 going to or coming from the U.S.S.R. had been opened at some
 13 point.

14 Although, in a sense, the plaintiffs brought
 15 their feeling of outrage upon themselves by seeking
 16 information, we do not believe, upon reflection, that this
 17 is a meaningful break in the chain of causation that links
 18 the mail openings to any anguish suffered. The mail
 19 opening was an intentional tort and it may be deemed to
 20 have been foreseeable that anguish might ensue if there
 21 were discovery. See Derosier v. New England Tel. & Tel. Co.,
 22 81 N.H. 451, 130 A. 145 (1925); Prosser, supra, at 263.²⁹

23 More troublesome is the fact that plaintiffs
 24 should have been aware that their mail might be opened
 25 by the Soviet officials (particularly in the case of Ms.
 26 MacMillen, who was writing to a well-known dissident). That
 27 could have convinced the trier of fact that there was no
 28 compensable damage. Indeed, the testimony of the plaintiffs
 29 with regard to their subjective feelings was both weak and
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1 meager. The nub of their testimony was that each felt
2 "disappointment" that their own government could do such
3 a thing. Such anguish is political rather than emotional,
4 much as a member of a Senate investigating committee might
5 feel toward the same revelation. The "injury" was
6 principally to "their wounded faith in our democratic
7 institutions," 436 F. Supp. at 989, a loss of faith
8 probably shared by many Americans who do not expect
9 compensation for such intellectual injuries.

10 The issue comes down to whether each plaintiff
11 suffered any mental injury whatever from the knowledge
12 that a single letter had been opened. As the District
13 Judge properly charged the advisory jury (and we assume
14 charged himself), the plaintiffs could not recover money
15 damages as a vindication of the rights of the American
16 people. Nor do we think that they may recover simply to
17 deter future action, for this particular statute prohibits
18 punitive damages -- the traditional "smart money" remedy
19 used to discourage repetitive conduct.

20 The District Court did find, however, that "the
21 emotional distress these plaintiffs suffered "was the sort
22 that would be experienced by reasonable people under the
23 almost unprecedented circumstances of these cases."
24 436 F. Supp. at 988. Though we could view this finding
25 as one merely of damage presumed from the circumstances,
26 worth only the nominal sum of one dollar, cf. Carey v.
27 Piphus, supra, we interpret the finding more generously
28 as determining that these plaintiffs, whose demeanor the
29 trial judge observed, actually suffered personal anguish.
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1 We give "due regard ... to the opportunity of the trial
2 court to judge of the credibility of the witnesses."
3 Fed.R.Civ.P. 52(a). Though the question of damages is
4 close, we affirm the money judgments for \$1,000 each,
5 with the feeling that they represent the upper limit of
6 allowable compensation in these cases. ³¹

7 With regard to the judge's order that the Government
8 send a letter of apology to each plaintiff, though such
9 letters might some day achieve monetary value as collectors'
10 items, we do not view them as "money damages," the only
11 form of relief provided in the Act. 28 U.S.C. § 1346(b).
12 See Moon v. Takisaki, 501 F.2d 389 (9th Cir. 1974);
13 Frankel v. Heym, 466 F.2d 1226, 1228 (3d Cir. 1972).
14

15 We accordingly reverse that part of the judgment
16 ordering that letters of apology be sent.

V

18 Birnbaum cross-appeals on the ground that the
19 District Court was in error because it denied his request
20 for a jury trial, to which he contends he was entitled
21 under the Seventh Amendment. He argues that the statute,
22 28 U.S.C. § 2402, which denies a right of jury trial,
23 violates the Constitution because this is a suit at common
24 law within the meaning of the Seventh Amendment. ³² "[S]uits
25 against the Government, requiring as they do a legislative
26 waiver of immunity, are not 'suits at common law' within
27 the meaning of the Seventh Amendment. McElrath v. United
28 States, 102 U.S. 426, 439-440." Glidden Co. v. Zdanok,
29 370 U.S. 530, 572 (1962) (plurality opinion of Harlan, J.);
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1 see Cargill, Inc. v. Community Credit Corp., 275 F.2d 745,
2 748 (2d Cir. 1960) (upholding statute barring jury trial
3 of a counterclaim by the United States).
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5 The judgments on appeal, except for the order to
6 send letters of apology, are affirmed. The denial of the
7 motion for a jury trial is also affirmed.
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F O O T N O T E S

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3 1. Senate Select Committee to Study Governmental
4 Operations With Respect to Intelligence Activities, Final
5 Report, Book III, at 571 (1976) (Pl. Ex. 11) [hereinafter Senate Report].
6 General discussion of the history of the CIA's mail opening
7 program may be found at id., at 559-636; Commission on CIA
8 Activities Within the United States, Report to the President
9 (1975) [hereinafter Rockefeller Report]; Department of
10 Justice, Report Concerning Investigation and Prosecutorial
11 Decisions with Respect to Central Intelligence Agency
12 Mail Opening Activities in the United States (A. 179-235).
13 [hereinafter D.J. Report].
14

15 2. Their allegations that they have exhausted
16 their administrative remedies, as required under 28 U.S.C.
17 § 2675, are conceded. Birnbaum also asked for the return
18 of all copies of his letters. MacMillen sought to bring
19 a class action.
20

21 3. Avery's son, Michael, who sent the letter,
22 sued separately in the District of Connecticut. His
23 claim has withstood a motion to dismiss. Michael Avery
24 v. United States, 434 F. Supp. 937 (D. Conn. 1977)
25 (Clarie, J.).
26

27 4. Plaintiff MacMillen's effort to convert her
28 suit into a class action was denied by Judge Weinstein.
29 436 F. Supp. at 985-86. That denial was not cross-appealed.
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1 5. All parties have stipulated that New York law
2 is to be applied.

3
4 6. MacMillen and Avery simply alleged that each
5 was "injured ... under circumstances where the United
6 States, if a private person, would be liable to plaintiff
7 in accordance with the law of the place where the acts
8 occurred." A. 6; see A.174. Birnbaum claims "damage to
9 his privacy, his exclusive property interest in the contents
10 of his mail, and his interests protected by the Fourth
11 Amendment...." A.17.

12
13 7. This provision has been interpreted to
14 include under the rubric of personal injury: mental
15 distress, Weicker v. Weicker, 53 Misc. 2d 570, 279 N.Y.S.
16 2d 852 (Sup. Ct.), rev'd on other grounds, 28 A.D. 2d
17 138, 283 N.Y.S. 2d 385 (1st Dept. 1967), aff'd, 22 N.Y. 2d
18 8, 237 N.E. 2d 876, 290 N.Y.S. 2d 732 (1968), invasion
19 of privacy [by appropriation, see N.Y. Civ. Rights Law
20 §§ 50, 51 (McKinney)], Riddle v. MacFadden, 201 N.Y. 215,
21 94 N.E. 644 (1911), and, in general, "every variety of
22 injury to a person's body, feelings or reputation."
23 Bonilla v. Reeves, 49 Misc. 2d 273, 279, 267 N.Y.S. 2d
24 374 (Sup. Ct. 1966); accord, Rolnick v. Rolnick, 55 Misc. 2d
25 243, 284 N.Y.S. 2d 908 (Sup. Ct. 1967); rev'd on other
26 grounds, 29 A.D. 2d 987, 290 N.Y.S. 2d 111 (2d Dept. 1968),
27 aff'd, 24 N.Y. 2d 805, 248 N.E. 2d 442, 300 N.Y.S. 2d 586
28 (1969).
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1 8. In Moore, supra, the New York court was follow-
 2 ing the holding of the House of Lords in Duke of Buccleuch
 3 v. Metropolitan Bd. of Works, L.R. 5 E. & I. App. 418
 4 (1872), sustaining damages, inter alia, for loss of
 5 seclusion when property abutting a home was taken and
 6 converted into a public highway. Moore and Ives were not
 7 overruled in the Roberson opinion and would still appear
 8 to be valid precedent. To be sure, there are statements
 9 to the effect that the only right of privacy recognized
 10 in New York is statutory. See, e.g., Flores v. Master
 11 Safe Co., 7 N.Y. 2d 276, 280, 164 N.E. 2d 853, 854, 196 N.Y.S.
 12 2d 975, 977 (1959); Gautier v. American Broadcasting Co., Inc.,
 13 304 N.Y. 354, 358, 107 N.E. 2d 485, 487 (1952); Kimmerle v.
 14 New York Evening Journal, 262 N.Y. 99, 102, 186 N.E. 217,
 15 217-18 (1933); Wojtowicz v. Delacorte Press, 58 A.D. 2d 45,
 16 47, 395 N.Y.S. 2d 205, 206 (1st Dept. 1977), aff'd, 43 N.Y. 2d
 17 858, 374 N.E. 2d 129, 403 N.Y.S. 2d 218 (1978). But none of
 18 these cases involved intrusions, as opposed to other sorts of
 19 infringements upon privacy. Compare Wojtowicz, supra, at 860,
 20 374 N.E. 2d at 130, 403 N.Y.S. 2d at 219 (as yet no New York
 21 recognition of common law "right to judicial relief for
 22 invasion of privacy in consequence of unreasonable publicity..."
 23 [emphasis added]).

24 9. Most states and the District of Columbia
 25 recognize invasions of privacy as actionable torts.
 26 Prosser, supra, § 117 at 804; I F. Harper & F. James,
 27 Law of Torts, supra, at 682-83; see, e.g., Pearson v. Dodd,
 28 410 F.2d 701 (D.C. Cir.), cert. denied, 395 U.S. 947
 29 (1969) (recognizing tort of intrusion in general);
 30 LaCrone v. Ohio Bell Tel. Co., supra (Ohio App.)
 31 (intrusion by wiretapping); Sutherland v. Kroger Co.,
 32 144 W. Va. 673, 110 S.E. 2d 716 (1959) (intrusion by
 search of shopping bag).

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10. In the three-quarters of a century since Roberson, the particular type of privacy invasion that was denied a remedy in that case -- appropriation and commercial exploitation of a person's name or photograph -- has itself gained statutory protection. 1903 N.Y. Laws, c. 132, §§ 1, 2 [current version at N.Y. Civ. Rights Law §§ 50, 51 (McKinney)].

11. The modern New York Court of Appeals has responded in the past to new trends in jurisprudence by altering or developing decisional law. See, e.g., Dole v. Dow Chem. Co., 30 N.Y. 2d 143, 148-51, 282 N.E. 2d 288, 291-94, 331 N.Y.S. 2d 382, 386-90 (1972); Babcock v. Jackson, 12 N.Y.2d 473, 477-82, 191 N.E. 2d 279, 281-84, 240 N.Y.S. 2d 743, 746-50 (1963); Battalla v. State, supra, at 239-40, 176 N.E. 2d at 730-31, 219 N.Y.S. 2d at 35-37; Woods v. Lancet, supra, 351-56, 102 N.E. 2d at 692-95.

12. We note in particular the manner in which the New York Court of Appeals has referred in dictum to a companion provision of the Penal Law -- § 250.05 (against eavesdropping) -- in the course of an opinion in which it upheld a cause of action against intrusion under the law of the District of Columbia. Nader v. General Motors Corp., 25 N.Y. 2d 560, 570 n.3, 255 N.E. 2d 765, 771 n.3, 307 N.Y.S. 2d 647, 655 n.3 (1970).

13. In Galella v. Onassis, 487 F.2d 986, 995 n.12
(2d Cir. 1973), we said:

Although the New York courts have not yet recognized a common law right of privacy, if we were required to reach the question, we would be inclined to agree with the court below that when again faced with the issue the Court of Appeals may well modify or distinguish its 1902 holding in Roberson v. Rochester Folding-Box Co., 171 N.Y. 538, 64 N.E. 442 (1902), that "The so-called right of privacy has not as yet found an abiding place in our jurisprudence." There is substantive support today for the proposition that privacy is a "basic right" entitled to legal protection, Time v. Hill, 385 U.S. 374, 415, 87 S. Ct. 534, 17 L.Ed. 2d 456 (1967) (Fortas, J., dissenting) There is an emerging recognition of privacy as a distinct, constitutionally protected right. Roe v. Ingraham, 480 F.2d 102 (2d Cir. 1973), (Friendly, J.)

14. Nor is it fruitful to consider the analogous common law tort of trespass to chattels as a ground of action here. The surreptitious opening and reproduction of the letters without appropriating or physically damaging

v

1 them does not fit easily under the rubric of trespass to
 2 chattels. That cause of action requires either a dispos-
 3 session of, or restraint on, the chattel, Wintringham v.
 4 Lafoy, 7 Cow. 735 (N.Y. Sup. Ct. 1827); Hamner v. Wilsey, 17 Wend. 91
 5 (N.Y. Sup. Ct. 1837), or its impairment by intermeddling,
 6 Socony-Vacuum Oil Co. v. Bailey, 202 Misc. 364, 109 N.Y.S. 2d
 7 799 (Sup. Ct. 1952); 1 Restatement (Second) of Torts, § 218(b)
 8 and Reporter's Note e; accord, Prosser, supra, at 77.
 9 Intermeddling is actionable only where the chattel has been
 10 "impaired ... as to its condition, quality or [material]
 11 value...." Restatement, id; contra F. Pollock, Law of Torts
 12 354 (12th ed. 1923). There was no dispos-
 13 session or impairment here. Moreover, to the extent
 14 that Entick v. Carrington, supra, tends to support an
 15 action in trespass here, it also, as we have seen,
 16 implies an action that can be defined as intrusion upon
 17 privacy. Since the demise of the forms of actions, we
 18 need not look further for state tort law than to the right
 19 of privacy which we have described. As the Supreme Court
 20 said in Warden v. Hayden, 387 U.S. 294, 304 (1967):

22 We have recognized that the principal
 23 object of the Fourth Amendment is the
 24 protection of privacy rather than property,
 25 and have increasingly discarded fictional
 and procedural barriers rested on property
 concepts [citing cases].

26 This applies as well to the non-constitutional torts of
 27 privacy.

28 15. The preemption of state common law of
 29 copyright by the 1976 copyright law revision, 17 U.S.C.
 30 § 301(a), is not relevant to any common law copyright cause
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1 of action in this case, since under the new law preemption
2 does not apply to causes of action arising before 1978.
3 Id. § 301(b)(2).
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7 16. That limited viewing does not constitute
8 the sort of publication that transgresses an owner's common
9 law copyright was implicitly recognized in the famous case
10 of Baker v. Libbie, 210 Mass. 599, 97 N.E. 109 (1912).
11 There, Chief Justice Rugg distinguished between the right
12 of an author of a letter and the right of the holder of
13 the physical letter by treating the former as a copyright
14 in the ideas and expression and the latter as a proprietary
15 right in the physical material. The Massachusetts court
16 then went on to hold that the author's copyright would
17 permit restraint of "publication ... in the sense of making
18 public through printing or multiplication of copies,"
19 but not the right to prevent a transfer of the letter
20 itself. Id. at 607, 97 N.E. at 112. Thus, the court
21 appeared to treat the copyright as unfringed by a limited
22 transfer (and, presumably, perusal).
23

24
25 17. This ruling becomes significant only if it
26 is held that violation of the right to privacy as a tort
27 does not exist under New York law. Upon that alternative
28 assumption, however, we must address the question.
29 Moreover, as we shall see later, the right of action against
30 the United States does not depend upon a constitutional
31 violation by the CIA, but rather upon the commission of
32 acts which were beyond the delegated functions of the Agency.

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1 18. The cases on appeal arose before the 1973
2 Amendments to the Act, so we need not consider any effect
3 the Amendments should be deemed to have. Bogen, Gitenstein
4 & Verkuil, The Federal Tort Claims Act Intentional Torts
5 Amendment: An Interpretative Analysis, 54 N.C. L.Rev. 497,
6 520-21 (1976).

7
8 19. When the Act was amended in 1973, this
9 was assumed. See S. Rep. No. 588, 93d Cong., 1st Sess. 3
10 (1973).

11
12 20. Our decision in Marine Ins. Co. v. United
13 States, 378 F.2d 812 (2d Cir.), cert. denied, 389 U.S. 953
14 (1967) is not to the contrary. Marine Insurance held
15 that where customs agents had temporarily removed and
16 treated a mailed package of emeralds with a fluorescent
17 powder to detect a thief, the subsequent loss of the
18 package by postal authorities fell within the postal
19 exception. The claim in Marine Insurance was not for
20 redress because of the temporary removal and treatment
21 of the package, but for its subsequent "loss" from the
22 postal system, which would have occurred even if the
23 interception had not taken place. 378 F.2d at 815.

24
25 21. By way of contrast, in Kiiskila v. United
26 States, 466 F.2d 626 (7th Cir. 1972), a decision was
27 treated as discretionary because the applicable regulation
28 was interpreted as reserving to the decisionmaker broad
29 discretion, including "the authority to grant exceptions."
30 Id. at 628.

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22. Legislators wanted

to make certain that the activities and the functions of the Central Intelligence Agency were carefully confined to international matters, to military matters, and to matters of national security. We have enough people now running around butting into everybody else's business in this country without establishing another agency to do so.

I do not think it would be the Central Intelligence Agency's right, authority, or responsibility to check on the ordinary domestic activities of the average American citizen....

Hearings at 438-39 (Rep. Brown).

23: Under § 102(e) of the National Security Act, 50 U.S.C. § 403(e), the Director of the CIA may obtain by written request from the FBI such information as may be essential to national security. But there is no correlative mandate to assist the FBI's domestic operations in a covert manner.

24. An FBI internal memorandum of 1966 illustrates the sorts of information garnered by the CIA's mail openings: intelligence "regarding persons involved in the peace movements, anti-Vietnam demonstrations, women's organizations, 'teach-ins' ..., racial matters...." Senate Report at 633 & n.336.

ix

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and David S. Berger, Chief Counsel,
Attorney, Eastern District of New
York, of counsel), for Defendant-
Appellant.

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1 25. Quoted in Rockefeller Report at 108.

2
3 26. The only possibly arguable escape from this
4 compelling conclusion might be if it could be established
5 that the President had actually authorized the mail
6 openings under his Article II power to conduct foreign
7 affairs. See United States v. Curtiss-Wright Export Corp.,
8 299 U.S. 304 (1936); cf. United States v. United States
9 District Court, 407 U.S. 297, 308-09 (1972) (Keith)
10 (leaving open the question whether the Fourth Amendment
11 warrant requirement applies to the President's surveillance
12 power respecting "the activities of foreign powers" or
13 their agents). Of course, these cases do not in any
14 way imply that the President may ignore a specific
15 limitation placed by Congress on the powers of an agency
16 it has created by statute. But, in any event, it has been
17 demonstrated above that these particular mail opening
18 activities were not directed against "activities of foreign
19 powers" or their agents. And we have learned that the
20 President has no special constitutional power in matters
21 involving domestic intelligence. Keith, supra; compare
22 Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952).

23 There is, moreover, an absence of proof upon
24 this record that the CIA was acting under direct presiden-
25 tial authority. See generally, Senate Report at 594-99.
26 The untimely death of Allen Dulles, long time Director
27 of the CIA, and the deaths of several successive presidents
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X

1 make such proof unavailable. President Nixon, the sole
2 surviving President from this period, does not recollect
3 being told about the mail openings. Senate Report at
4 597-98. Nor would speculation about what our presidents
5 knew or did not know be fruitful or in the public
6 interest. Though courts might feel compelled to delve
7 further into that matter if an agent's feet were being
8 held to the fire in a criminal case, there is no such
9 compulsion in an action against the United States for
10 money damages.
11

12 27. The Court of Appeals in Ferrara permitted
13 recovery in a case in which "permanent symptoms of anxiety"
14 were present, noting that "[i]t is self-evident that every
15 case be decided according to the facts peculiar to it." Id.
16 at 22, 152 N.E. 2d at 253, 176 N.Y.S. 2d at 1000.
17

18 28. Since cases have not arisen in New York
19 in which there has been a judgment in damages for
20 intrusion of privacy, there is no direct precedent
21 available, as Judge Weinstein observed.
22

23 29. Significantly, the CIA could not have
24 refused to release this information under the Freedom of
25 Information Act. Under the 1974 amendments, P.L. 93-502
26 § 2(b), an exception from disclosure is available with
27 respect to an "agency conducting a lawful national
28 security intelligence investigation," for confidential
29 information "furnished only by [a] ... confidential
30 source." 5 U.S.C. § 552(b)(7)(E). The use of the
31 word "lawful" indicates that Congress understood that
32 there could be unlawful intelligence investigations, and
that the product of such operations would not be excepted
from disclosure.

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2-5-75-175M-003

30. Except possibly for Senator Church,
Chairman of the Senate Select Committee investigating
intelligence activities, whose own personal mail to the
Soviet Union had apparently been opened by the CIA. See
Senate Report at 575-76.

31. In affirming, we are cognizant that the
Statute of Limitations has run by now on all unfiled mail
opening claims for relief. The last mail opening occurred
in 1973, Senate Report at 603-04, and no such program has
existed thereafter. The matter was exposed to public
knowledge long before the Rockefeller Report was published
in June 1975, and even if either the New York statute of
one year (CPLR § 215) or of three years (CPLR § 214)
should be taken to run from discovery with the exercise of
due diligence -- a most unlikely rule in this type of case --
the statute has clearly run.

32. The Seventh Amendment provides in pertinent
part:

In suits at common law, where
the value in controversy shall exceed
twenty dollars, the right of trial by
jury shall be preserved

Birnbaum v. United States

*I concur in
part and
dissent in
part in separate
opinion
4/8/78 JMW
WCS*

Birnbaum v. United States

*I concur.
James H. Dukes
Oct. 16, 1978*

and David G. Trager, United States
Attorney, Eastern District of New York

United States Court of Appeals

SECOND CIRCUIT

NORMAN BIRNBAUM, et al.,
Plaintiffs-Appellees,

-against-

UNITED STATES OF AMERICA,
Appellant.

OPINION

GURFEIN, C. J.

FPI-SS-0-26-74-1M-338

1 MOORE, Circuit Judge (Concurring in part; dissenting in part):

2 I concur in Judge Gurfein's opinion both reluctantly
3 and quite dubitante except as to part IV thereof, dealing with
4 damages as to which I dissent. I say "reluctantly" because
5 I cannot distinguish the Supreme Court's decision in United
6 States v. United States District Court, 407 U.S. 297 (1972);
7 I say "dubitante" because but for that decision I might have
8 believed that the opening of Soviet Union - U.S.A. corres-
9 pondence might well be a "discretionary function or duty on
10 the part of a federal agency" particularly since it matters
11 not "whether or not the discretion be abused".

12 The CIA is an agency created by Congress to protect
13 our national security in the international field. If the CIA's
14 powers should be expanded or particularized, Congress is
15 always free to so act. In the meantime the courts will
16 continue to be plagued with the necessity of evaluating and
17 balancing the basic values to be resolved, namely, "the duty
18 of Government to protect the domestic security and the
19 potential danger posed by unreasonable surveillance to in-
20 dividual privacy and free expression". 407 U.S. at 315.

21 As to the amount awarded, even a one dollar sum
22 (presumably the usual six cents now raised to one dollar
23 because of inflation) would not be justified. The plaintiffs
24 who had written the letters knew their contents. If "mental
25 anguish" resulted from a revelation of their contents, the
26 anguish was of their own creation. If the anguish was in
27 the mind of the recipient, it was not created or enhanced by
28 the government's mail opening. I would, therefore, restrict
29 the damages to one dollar.
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